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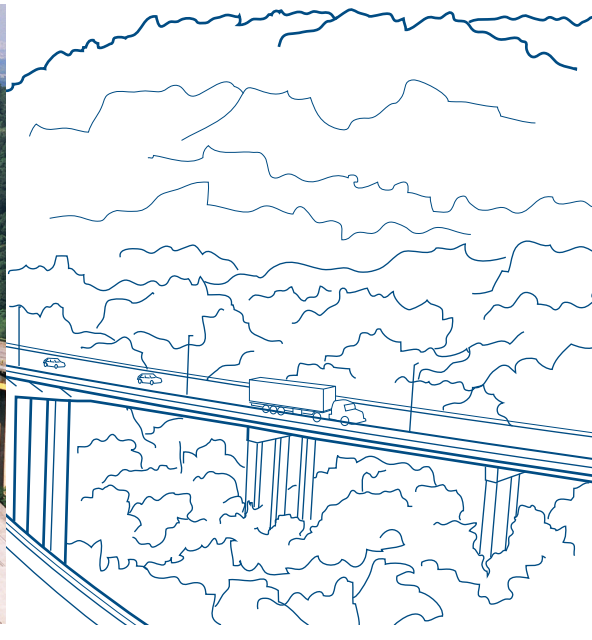

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20 Brazil's Anti-Corruption Laws, the FCPA and the UK Bribery Act: A Comparative View[1]

Cesar Pereira[*]*, Jacqueline Henry-Lucio*[**] *and Luísa Paschoaleto Martim*[***]

20.1 Introduction

Most countries implement anti-corruption policies, which often grow into anti-corruption laws. Nonetheless, it is said that "[t]he majority of people around the world believe that their government is ineffective at fighting corruption and [that] corruption in their country is getting worse."[2] Voicing similar concerns, in June 2013, Brazilians protested and rioted in the streets demanding more transparency and less corruption.[3]

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1 The authors thank Diane Camacho, a NY-based attorney, for her invaluable assistance in editing this chapter.

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2 D. Hardoon & F. Heinrich, '2013 Global Corruption Barometer', 2013, available at: <http://transparency.hu/uploads/docs/GCB2013_Report_Embargo.pdf>, access on 15 December 2015.

3 B. Brooks, 'Brazil: 250K Protest Against Government Corruption', *USA Today*, 23 June 2013, available at: <www.usatoday.com/story/news/world/2013/06/22/brazil-thousands-protest-anew-but-crowds-smaller/2449229/>; 'Brazil Protests: Dilma Rousseff Unveils Reforms,' *BBC World*, 22 June 2013, available at: <www.bbc.com/news/world-latin-america-23012547>, access on 15 December 2015.

That same year, Transparency International conducted a global survey,[4] where more than one in four people, an estimated 27%, reported having paid a bribe in the last year when interacting with key public institutions and services.[5] The same survey also revealed that two-thirds of those propositioned to pay a bribe say that they refused, indicating there may be a stronger movement to stop corruption than one may have thought.[6]

The most popular means of combating corruption has been anti-corruption laws. The United States implemented the Foreign Corrupt Practices Act (FCPA) in 1977 after incidents like the Watergate scandal exposed how far corruption had reached within the national government.[7] Although the U.S. had always banned domestic corruption, the FCPA was the first law to directly prohibit payments to foreign officials for purposes of influencing any official act, obtaining or retaining business or for securing any other kind of improper advantage.[8]

The UK followed with the UK Bribery Act ('Bribery Act'), which has been in force since 2011.[9] The Bribery Act targets a wide range of situations that can be grouped into four "categories of offenses: (1) bribing another person; (2) taking bribes; (3) bribing foreign public officials; (4) the failure of a commercial organization to prevent bribery."[10] Similar to the FCPA, the UK Bribery Act makes it illegal for companies to pay foreign government officials for their assistance in obtaining or retaining business. However, it also holds companies liable for failing to prevent bribery.[11] Yet by 2014 only three convictions had been brought under the Act, none of which involved corporate corruption.[12]

Brazil's newest anti-corruption law, the Brazilian Anti-corruption Act (BACA), was enacted on 1 August 2013, and entered into force 180 days later in January 2014, which marks a remarkably quick turnaround for the country.[13] The BACA was timed perfectly

4 Note: this study consisted of 114,000 respondents in 107 countries, approximately 1,000 respondents per country.

5 Hardoon & Heinrich 2013.

6 *Id.*

7 For a detailed account of the Watergate scandal and a timeline of events, *see* <www.washingtonpost.com/watergate/>, access on 15 December 2015.

8 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§78dd-1, *et seq.*) (hereafter 'FCPA').

9 UK Bribery Act, 2010 Chapter 23, 8 April 2010, available at: <www.legislation.gov.uk/ukpga/2010/23/contents>, access on 15 December 2015.

10 L.J. Trautman, 'Lawyers, Guns, and Money: The Bribery Problem and the U.K. Bribery Act', *International Lawyer* 2013 (Winter), Vol. 47, p. 481.

11 M.E. Egan, 'The Bribery Act in Action; Britain's New Anticorruption Law Has Resulted in Few Convictions—but Has Created More Work for Lawyers', *TAL Asian Lawyer* (Online), 1 July 2014, LEXIS.

12 *Id.*

13 M. Carvalhosa, 'Considerações Sobre a Lei Anticorrupção das Pessoas Jurídicas: Lei 12.846/2013 83', *in* C.G.B. de Faria, et al., (Eds.), Revista dos Tribunais, São Paulo 2015; K.S. Rosenn & R. Downes, 'Corruption and Political Reform in Brazil: The Impact of Collor's Impeachment', *Foreign Affairs,* 1 July 1999, available at: <www.foreignaffairs.com/reviews/capsule-review/1999-07-01/corruption-and-political-reform-brazil-impact-collors-impeachment>, access on 15 December 2015.

to come into force after the riots in June 2013 and the Mensalao trial, which, similar to Watergate, dealt with public funds paid to parties and officials for political support.[14] The BACA focuses on combating fraud and corruption in interactions with government officials and in public contracts, including in the bidding and acquisition process. It also covers a range of corruption acts outside of those directly related to public contracts in addition to being a strict liability statute.[15]

For over a decade, Brazil had been cooperating in the fight against corruption at an international level, first by adopting in 2000 the Organization for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Offices in International Business Transactions (OECD Convention), which was ultimately ratified in 2002, and then by signing the United Nations Convention against Corruption in 2003.[16] The BACA corresponds to Brazil's specific implementing legislation of the OECD Convention, although a variety of other laws dealt with corruption and misconduct before the BACA was enacted. By 2013, Brazilian authorities had only initiated one case and pursued two investigations involving international bribery since 2002 when Brazil ratified the OECD Convention.[17]

The BACA contains significant administrative and civil penalties for violations of its provisions, but the actual system for enforcing the Act's provisions is still being developed.[18] Whereas in the United States the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) enjoy well-established lines of communication for the purpose of enforcing the FCPA, their Brazilian counterparts do not yet have any such mechanism to aid in the enforcement of the BACA. Neither the statute nor the secondary legislation provides for cooperation or communication between the different governmental entities designated to handle enforcement. Additionally, the BACA lacks the specificity of the UK Bribery Act; however, additional secondary legislation may yet fill those gaps in the future. The various enforcement agencies (TCU, CGU, CADE, Public Ministry) handled a large number of cases in 2014-2015, owing to well-publicized corruption scandals. This is expected to create stronger cooperation and more communication or collaboration between such agencies.

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14 J. Fellet & A. Correa, 'Will Brazil's 'Mensalao' Corruption Trial Bring Change?' *BBC Brasil* website, 7 December 2012, available at <www.bbc.com/news/world-latin-america-20639111>, access on 15 December 2015.

15 *Lei No*. 12.846, de 1° de Agosto de 2013, Diário Oficial da União [D.O.U.] de 2.08.2013 (Braz.). *See*: <http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?jornal=1&pagina=1&data=02/08/2013>.

16 *See* <www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm> and <www.unodc.org/unodc/en/treaties/CAC/signatories.html>, access on 15 December 2015.

17 J.C. Varela, et al., 'Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know', *Littler,* 22 August 2013, available at: <www.littler.com/brazils-new-anti-corruption-law-what-every-multinational-employer-should-know>, access on 15 December 2015.

18 *See* Lei 12.846, *supra*, note 15.

This is an introductory perspective of the examination of the anti-corruption laws in Brazil. It hopes to shed light on their functionality both with what they seem to present and how they actually work in order to provide a layman with sufficient information to navigate Brazil's anti-corruption system.

20.2 An Overview of the Main Administrative and Judicial Bodies Responsible for Anti-Corruption Initiatives

20.2.1 Tribunal de Contas da União (TCU)

The Federal Court of Audit of Brazil (TCU in the Portuguese acronym) is an auxiliary body of the Legislative Power. However, considering that it does not have powers to enforce laws, TCU's function is not actually legislative in nature. Rather, TCU is an external controlling and supervisory body for administrative activities.

Although linked to the Legislative Power, TCU is not subordinate to it. The court has independence regarding the legislative, executive and judiciary powers; in other words, it is not possible for the other branches to intervene in TCU's activities. TCU's oversight also encompasses administrative action by any branch of federal government. At the same time, TCU's actions are subject to judicial review and may be annulled by the judiciary branch if found to be unlawful.

It is TCU's responsibility to review the legality, economy and legitimacy of administrative acts, and to that end it will audit the accounts of the individuals responsible for managing public money. If any illegality is found, TCU may impose penalties on the persons responsible for such accounts. Thus, TCU can, for example, impose fines and/or declare a bidder disqualified for up to five years (Art. 46, Law n. 8.443).

20.2.2 Controladoria-Geral da União (CGU)

The CGU is a federal government agency that was established by Law n. 10.683 of 2003. The primary purpose of this agency is to serve as the central agency for internal control and audit of public bodies. However, it also serves the executive branch on all matters. As part of a 2006 government initiative, the Secretariat for the Prevention of Corruption and Strategic Information, a unit within the CGU, became responsible for promoting transparency and preventing corruption. In addition, it is responsible for coordinating the implementation of international conventions combating bribery, including the OECD and UN Conventions. In a related manner, it has established a website dedicated to the OECD Convention and those responsible for 'promoting' the Convention within both the private

and public sectors. The tasks of the States and Municipalities to comply with the Convention and to combat foreign bribery are also located here.[19]

CGU has concurrent or subsidiary authority with the highest governing authorities when dealing with violations of the BACA. It also has the authority to commence investigations and adjudicate violations of BACA involving foreign governments.

20.2.3 Conselho Administrativo de Defesa Econômica (CADE)

CADE is Brazil's antitrust authority, charged with upholding Brazilian competition law at an administrative level. Its rulings are final but may be challenged in court. Leniency agreements in Brazil started to be adopted in antitrust cases by CADE. Since Brazilian antitrust law extends to violations in government procurement as well, CADE has been playing an important role in identifying and fighting wrongdoings such as bid rigging or other types of conduct that affect the fairness of public tenders. According to an official Brazilian publication, in terms of anticompetitive conduct, the cartel is the most serious injury to competition. [20] Since 2003, Brazil has considered combating cartels an absolute priority.[21] The first leniency agreement was signed on October 8, 2003, and its subject matter was a case of bid rigging (public procurement) in Southern Brazil.[22]

20.3.1 CADE and Leniency Agreements

The Brazilian leniency program has been "very effective" between 2003-2014, with a total of 47 leniency agreements.[23]

Because CADE has its own prosecution (Superintendência-Geral) and tribunal for adjudication (Administrative Tribunal for Economic Defense or CADE Tribunal), the entire investigation and proceeding can take place within CADE itself. Part of the benefit of Brazil's leniency program is that a leniency agreement may lead to full immunity within

19 *See* <www.gcu.gov.br/ocde>, access on 15 December 2015.

20 Secretaria de Direito Econômico, Ministério da Justiça: Conselho Administrativo de Defesa Econômica, "Combate a Cartéis e Programa de Leniência, 3rd ed., Coleção SDE/CADE n. 01/2009, 2009, 6. Available here: http://www.cade.gov.br/upload/Cartilha%20Leniencia%20SDE_CADE.pdf.
Note: Here, cartel is defined as an agreement, principally, to fix prices or quotes of products thereby dividing the clients and the market.

21 Secretaria de Direito Econômico, Ministério da Justiça: Conselho Administrativo de Defesa Econômica, 2009, pp. 7.

22 Secretaria de Direito Econômico, Ministério da Justiça: Conselho Administrativo de Defesa Econômica, 2009, pp. 7.

23 Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs: Competition Committee, "Use of Markers in Leniency Programs—Brazil—", DAF/COMP/WP3/WD(2014)47, 16 Dec 2014, pp. 5. Available here: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)47&docLanguage=En.

administrative and criminal prosecutions. However, the beneficiary of any agreement will not be protected from civil liability actions brought by third-parties.[24] Provisional Measure (MP) 703, of 18 December 2015, aimed to resolve this by allowing the Prosecutors Office (Public Ministry) and other public bodies to take part in final and comprehensive leniency agreements.

Generally, in Brazil, leniency agreements have been used for procedural purposes. Laws 10.149 of 2000, and Law 12.529 of 2011 give CADE authority to enter into leniency agreements. Article 35B of Law 10.149, which provides for the prevention and repression of infractions against the economic order (and effectively replaces Lei 8.886), not only authorizes leniency agreements, but under Paragraph 4, states that the leniency agreements are not subject to CADE approval, although the agency would still be needed to verify that the agreement has been complied with for the administrative trial. MP 703 has also changed in part this setting by reducing the procedural importance of leniency agreements and focusing on the issue of punishing the guilty companies while allowing them to continue to operate in the market.

Similar to the leniency agreements authorized under BACA, the CADE agreements require:

I. the company or physical person is the first to qualify with respect to the alleged violation or investigation (in BACA agreements, this requirement was severely reduced by MP 703);
II. the company or physical person completely ceases their involvement in the alleged violation from the date the agreement is proposed;
III. the Superintendência-Geral (SDE), the Brazilian prosecution, does not have sufficient evidence to secure a conviction of the company or physical person at the time the agreement is proposed; and
IV. the company or physical person confesses their participation in the violation and fully collaborates with the investigations and administrative proceedings.

The advantage to entering into a CADE leniency agreement may, like the BACA agreements, reduce the applicable monetary sanctions by two-thirds.[25] However, because a leniency agreement may only be authorized for the first company to step forward, the Brazilian leniency program as of 2013 settlement regulations also allows subsequent defendants who can offer new evidence to deepen the investigation to enter into a settlement, which may

24 Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs: Competition Committee, 2014, p. 3.

25 *See* Article 35B, Paragraph 4.

result in a fine reduction, or to apply for leniency plus, a program designed for defendants who have been involved in other wrongdoings still unknown and apt for leniency.[26]

For CADE leniency programs for anticompetitive conduct, Law 12.529 has similar requirements to Law 10.149, but it needs the agreement to result in (i) the identification of other participants of the violation, and (ii) the prosecution getting access to documents and information to prove wrongdoings.[27] Additionally, administrative immunity or a penalty reduction is granted where the actor has no prior knowledge of the violation occurring. Criminal immunity may also be provided.

20.3.1.1 CADE and The Brazilian Marker System

Surprisingly, the Marker System in Brazil was not created by competition law but by the Ministry of Justice. The Marker System allows for CADE's Superintendência-Geral to issue a "declaration," certifying a formal leniency application as the first position in line, for a potential leniency applicant that has not gathered all the required information and documentation.[28]

The requirements for a marker require that the applicant (1) is the first-in, (2) provide complete identification of the other participants of the cartel, (3) identify the products, services, and geographic areas affected by the anticompetitive practice and where possible the duration. When all requirements are met, the Superintendência-Geral has three days to issue the marker. However, CADE retains full discretion to sign the leniency agreement or not at the end of the leniency agreement negotiation process. Additionally, the applicant has thirty days to provide all the required documentation and information for the formal leniency application after the marker is granted.[29]

20.3.1.2 CADE Leniency Agreements in Action[30]

As part of Petrobras' big bid rigging cartel investigation (Operação Lava Jato/Operation Car Wash), CADE's Superintendência-Geral signed two leniency agreements linking companies with ANGRA 3 and UTA 3. This information is under public domain since the confidentiality of the agreements was lifted by the parties. The information below is available at CADE's website.

The Setal agreement was signed by Setal Engenharia e Construções, SOG Óleo e Gás, and current and former employees of the companies. They are allegedly part of a cartel in

26 Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs: Competition Committee, 2014, p. 3. *See also*: Law 12.529, Article 85.

27 *See*, Law 12.529, Article 86.

28 Note: Regulation n.04/2006 initially created the Brazilian Marker System.

29 Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs: Competition Committee, 2014, p. 4.

30 Note: At the time of closing of this article an MP was in force dealing with leniency agreements and related topics.

public procurement for Petrobras' onshore industrial assembly construction projects, operating in the oil and gas industry. The Setal leniency agreement has resulted in a fine for the two companies that is only a maximum of 20% of the advantaged gained.[31]

The signatories confessed their participation in the cartel, provided information and presented evidentiary documents to collaborate in the investigations dealing with the public procurement contracts in the onshore industrial assembly projects. The agreements contain a "Conduct History" for each of the signatories, which was made non-confidential by agreement of the parties. This is a detailed list of anticompetitive practices committed with accompanying documentary evidence. In order to keep the investigation going, the signatories have partially waived confidentiality of the agreement and its annexes.[32]

In the second leniency agreement linked to the Operation Car Wash investigation, Camargo confessed to participation in the alleged cartel price fixing from 2013-2014 in public bidding for electromechanical assembly work of the Angra 3 power plant, which is owned by Electrobras Termonucluear S/A—Electronuclear. The revelation of facts pertaining to a different wrongdoing allowed Camargo to apply for the so-called leniency plus. According to leniency agreement requirements, Camargo identified Construtora Andrade Gutierrez S/A, Constutora Norberto Odebrecht S/A, Construções e Comércio Camargo Correa S/A, (known collectively as the UNA 3 consortium) and Construtora Queiroz Galvão S/A, EBE—Empresa Brasileira de Engenharia S/A, Techint Engenharia e Construções S/A, UTC Engenharia S/A, (known collectively as the ANGRA 3 consortium) and over twenty individuals as being participants in the alleged anticompetitive conduct.

Allegedly, UTA 3 and ANGRA 3 were part of the "Big Group" or the "Big Council," which agreed to fix prices and conditions of the Electronuclear Tender Notice No. GAC.T/CN-003/13, which had two contracts: one servicing the nuclear circuit and one for the non-nuclear circuit. The cartel allegedly decided that UNA 3 consortium ("G4") would win both contracts at a previously fixed price, but then relinquish one of the contracts to ANGRA 3, which was allegedly done to avoid high discounts.[33]

On July 31, 2015, pursuant to Articles 86 and 87 of Law 12.529/2011, the Superîntendencia-Geral of CADE signed a conduct cessation agreement (TCC) with Comércio Camargo Correa S/A, its current and former employees of the company and its former President. The agreement does not amount to a leniency agreement and is the agreement offered for those companies or individuals who wish to cooperate but do not have the benefit of being the first one in. It was signed conjointly with the Public Ministry of the

31 R. Agostini, *Setal fecha acordo com Cade e delata cartel em obras da Petrobras,* in Folha de S.Paulo, 20/03/2015. See: http://www1.folha.uol.com.br/poder/2015/03/1605781-setal-fecha-acordo-com-cade-e-delata-cartel-em-obras-da-petrobras.shtml.

32 CADE's Public Relations Unit, Notícias, *Cade celebra acordo de leniência no âmbito da 'Operação Lava Jato,'* 20 March 2015, http://www.cade.gov.br/Default.aspx?cf63b345dc32c64cde6cff53e668.

33 CADE's Public Relations Unit, Notícias, *Cade signs leniency agreement in cartel in public bidding of Angra 3 nuclear power plant,* 31 July 2015, http://www.cade.gov.br/Default.aspx?320515e43cd126ed380556ec4004.

State of Paraná (MPF/PR) ("Car Wash Operation Task Force"[34]), the confidentiality of which was partially waived by all signatories as well as CADE and the MPF/PR. CADE's leniency agreement also included criminal immunity for the cartel behavior.

Both the Setal and Camargo leniency, leniency plus and TCC agreements are examples of CADE's effective use of self-reporting to assist in gathering evidence and understanding in larger investigations.

20.2.4 Ministério Público (Public Ministry)

Public Ministry is an independent body in charge of criminal prosecution, and is charged with protecting core aspects of Brazil's public policy at federal, state and local levels. It has broad authority to order criminal and civil investigations, and to bring criminal or civil actions in a wide variety of settings. For the purposes of the subject matter of this article, the Public Ministry has the standing to bring lawsuits against violators of anti-corruption laws seeking redress, fines and/or other sanctions.

20.3 An Overview of the Main Laws

There are several key laws that govern anti-corruption in Brazil. The Brazilian Constitution states a broad condemnation of unlawful acts that result in a loss to the federal treasury. The Law of Improbity deals with penalties for government officers and private parties receiving wrongful enrichment, causing injury to the public treasury or violating the public administrative principles. The BACA deals with unlawful acts performed, among others, by officers, directors, agents, organizations and companies. Decree n. 8420 regulates the BACA and discusses both civil and administrative penalties for violations of the law. More importantly, it sets forth the criteria for a compliance system to be considered as an extenuating circumstance under the BACA. Finally, CGU Resolution 1 provides further details about regulating Decree n. 8420.

20.3.1 The Brazilian Constitution

The Brazilian Constitution currently in force was promulgated in 1988 and is the first line of defence against corruption. It states:

34 Note: Operation Car Wash is an ongoing investigation to reveal the one of the biggest scandals of corruption at the highest levels of management between corporations and the government.

> The law shall establish the limitations for illicit acts, performed by *any agent*, whether or not a Government employee, which cause losses to the Public Treasury, without prejudice to the respective claims for reimbursement" (*emphasis added*).[35]

The inclusion of the term "any agent" gives the Constitution a wide reach within its jurisdiction. However, with respect to the sanctions specifically set forth in the so-called Administrative Improbity Law, it is necessary that a government employee (or a person acting in such a capacity) be involved in the misconduct in order for such sanctions to apply.

According to the Code of Civil Procedure, Brazilian courts will have jurisdiction over these cases under the following conditions: (1) when the defendant, regardless of his nationality, is domiciled in Brazil; (2) when Brazil is the place where the obligation must be performed or (3) when the original action or fact occurred in Brazil.[36] Although it is likely that each of these three cases could include a foreign counterpart, the second situation could have a much farther reach depending on how "domicile" is defined.

Similarly to the American system, a foreign legal person who has an agency, branch or subsidiary in Brazil is considered to be domiciled in the country, thereby granting Brazil jurisdiction.[37] This entitles Brazil to bring charges against a legal person for violation of the Federal Constitution, in addition to any other federal or state laws that might have been violated in a similar manner.

20.3.2 Brazilian Law n. 8.429 (Administrative Improbity Law)

The Administrative Improbity Law (AIL) was the next big step Brazil took to fight corruption.[38] The law, passed in 1992, deals with government officers and their private counterparts who commit improbity acts, classified by the law in three categories: (i) wrongful enrichment due to their public position within direct or indirect public administration, or within a public foundation of any branch of the Union, States, Federal District, Municipalities or Territory, (ii) conduct that causes injury to public property or funds, even if no wrongful enrichment takes place and (iii) conduct that violates public administration principles,

35 *Constituição Federal* [C.F.] [Constitution] (Braz.), Art. 37, para. 5, available at: <www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>, access on 15 December 2015. English translation available at: <www.stf.jus.br/repositorio/cms/portalstfinternacional/portalstfsobrecorte_ en_us/anexo/constituicao_ingles_3ed2010.pdf>, access on 15 December 2015.

36 *See Código de Processo Civil*, Art. 88, Sections I-III.

37 *See Código de Processo Civil*. Art. 88, "Para o fim do disposto no n. I, repute-se domiciliada no Brasil a pessoa jurídica estrangeira que aqui tiver agência, filial ou sucursal."

38 Law n. 8.429 is translated in this volume.

even if no wrongful enrichment or injury is found to exist. Each category entails a certain set of sanctions ranging from fines to debarment and suspension of political rights. The law is drafted in such a way that the definition of each general category of offence comprised in the statute is accompanied by a description of examples of actions falling under each category. MP 703, of 18 December 2015, changed a basic premise of the Administrative Improbity Law by allowing for settlements, which had been forbidden by its Article 17, 1, since the law was enacted in 1992.

20.3.2.1 Penalties

There are three types of penalties associated with the Administrative Improbity Law. All three stem from the same base of performing an administrative misconduct act, but their distinctions lie in the varying results of the prohibited conduct. The penalties themselves are based on the penalties associated with violating Articles 9-11 of this law, which involve performing an administrative misconduct act of one of the three categories described above.

Article 9 addresses administrative misconduct that results in the wrongful enrichment of the actor. The penalties for such violations include:

I. Full compensation of goods and assets unduly gained;
II. Loss of public office;
III. Suspension of political rights for **eight to ten years;**
IV. Payment of a civil fine up to **three times** the value of the assets gained;
V. Prohibition of contracting with the government or receiving benefits through a legal entity, even that of which the violator is a shareholder, for a period of **ten years**.

The first two penalties are present in all three types of administrative misconduct acts. The last three penalties vary with the type of violation committed.

Article 10 sets forth penalties for administrative misconduct that results in an injury to the treasury itself. Notably, to establish this type of misconduct, the prohibited act must have been carried out either willfully or negligently. Again, the first three 'base' penalties remain the same as for violations of Article 9. However, there are several important differences in the last three penalties, which include:

a) Suspension of political rights for **five to eight years**;
b) Payment of a civil fine up to **twice the value** of the damages;
c) Prohibition of government contracting or receiving benefits directly or indirectly, even when the violator is the majority shareholder, for a period of **five years**.

This is the only violation that can theoretically be committed by negligence under the Administrative Improbity Law, and the penalties are therefore less severe than those for a violation of Article 9. Since wrongful enrichment does not factor into this discreet anal-

ysis, all three of the penalties here are less burdensome than their Article 9 counterparts. Suspension is decreased by a potential range of three to five years, the civil fine is lower and the prohibition period for government contracting or receiving benefits is also of a significantly shorter duration.

Article 11 provides for the third type of AIL violation, and includes administrative acts that violate the public administrative principles, through any act or omission that violates the duties of honesty, impartiality, legality and loyalty to the institutions. Penalties for this kind of violation again include the three base penalties, and also the following:

a) Suspension of political rights for **three to five years**;
b) Payment of a civil fine up to **one hundred times** the amount of the compensation (salary) paid to the guilty government official;
c) Prohibition from contracting with the government or receiving benefits directly or indirectly for a period of **three years**.

It seems strange that the suspension period of political rights and prohibition of government contracting continues to decrease under this provision, and that the civil fine is measured by an entirely different metric than under Articles 9 and 10. This shows that from an administrative perspective, the Act is less severe when punishing violations that merely offend public administration principles than when punishing violations that result in a loss to the treasury or wrongful enrichment.

It is also important to note two other aspects of this law. The first is that the provisions in this law also apply to beneficiaries of the misconduct, even if they are not government employees. The second is that this law also holds heirs and successors liable for the wrongful enrichment and other financial obligations such as fines and damages arising out of the Improbity Law. Both give the authority to prosecute those outside the government sphere, thereby broadening the reach of the law – even though the participation of a government employee (or someone acting in this capacity) is always required for an improbity conduct to take place.

20.3.2.2 Enforcement

From an enforcement standpoint, the law divides the initiatives into two parts: preparatory probes, and the filing of a lawsuit seeking penalties and other consequences available under the Improbity Law. Both the Public Ministry and the injured government entity have the standing to file a civil lawsuit in such cases. Administrative improbity is also a criminal offence, which is prosecuted by federal or state prosecutors in accordance with applicable Brazilian criminal procedure. Civil and criminal initiatives are independent and are generally carried out concurrently.

20.3.3 Brazil and the OECD

Another form of combating bribery and corruption exists in international agreements. The OECD is an international organization that monitors member countries and other areas in their economic development. The OECD uses data analysis to help governments fight poverty and promote economic growth and financial stability. The OECD committee then uses this data to inform policy discussions, after which the OECD Council issues recommendations that are then implemented by the member states. In addition, these committee discussions can also lead to the creation of guidelines, standards and models, or even formal agreements.[39]

The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention') is one such formal agreement. It creates legally binding standards that criminalize bribery of foreign public officials in international business transactions. It is the first and only international anti-corruption instrument that is focused on the aspect of 'supply' of corruption, or, in other words, the physical act of actually making such corrupt payments.[40] By observing the OECD Convention, the thirty-four OECD member countries and seven non-member countries agreed to incorporate anti-bribery provisions into their respective laws.[41]

Although Brazil is a non-member, it does have a strong relationship with the OECD, and since 1999 has participated in all committee meetings, has ratified and complied with the OECD Convention, has been a member of the OECD's development centre and has signed the OECD's Declaration and Decisions on International Investment and Multinational Enterprise.[42]

Brazil ratified the OECD Convention in 2000, and in 2002 adopted domestic implementing legislation that amended the Penal Code to incorporate the offence of foreign bribery, which also includes a definition of the term 'foreign public official.' In addition, it amended the money laundering legislation to include foreign bribery as a predicate offence for the crime of money laundering. However, the OECD still had doubts about Brazil's ability to effectively implement and enforce the Convention.

In 2007, the OECD was concerned specifically with: "(1) whether a more proactive and comprehensive approach in initiating investigations of potential foreign bribery allegations is required by law enforcement authorities; and (2) whether the resources dedicated to foreign bribery investigations and training within the Federal Police, State Police and

39 *See* Organization for Economic Co-operation and Development (OECD), available at: <www.oecd.org/about/whatwedoandhow/>, access on 15 December 2015.

40 *Id.*

41 M.N. Darrough, 'The FCPA and the OECD Convention: Some Lessons from the U.S. Experience', *Journal of Business Ethics* 2010, Vol. 93, pp. 255-276.

42 *See* OECD, *supra*, note 37.

Ministério Público Federal are sufficient for the detection, investigation and successful prosecution of foreign bribery offences."[43]

20.3.3.1 The OECD Convention

The ultimate goal of the OECD Convention is to make the bribery of foreign officials a criminal offence. The elements of the offence are as follows: (i) the intentional offering, promising or giving, (ii) by *any* person, (iii) of "*any* undue pecuniary or other advantage" (directly or indirectly), (iv) to a foreign public official, whether to keep or for a third party, (v) so that the foreign official will *act or refrain from acting* in relation to performing official duties, (vi) "in order to obtain business or other improper advantage in the conduct of international business" (*emphasis added*).[44]

Another violation of the OECD Convention that results in a criminal offence includes complicity in an act of bribery of a foreign official, where "complicity" is defined as the "incitement, aiding and abetting, or authorization" of such bribe. A third violation considered by the OECD Convention is the "attempt and conspiracy to bribe a foreign public official." However, this is limited to being a criminal offence to the extent that an attempt and conspiracy to bribe a public official within the member state is a criminal offence.[45]

It should be noted that the OECD Convention provides elucidating commentary following the text of the Convention itself. This commentary makes clear that criminal charges must be brought for bribery of a foreign public official, irrespective of local customs.

20.3.3.1.1 Sanctions

Much of the language of the OECD requires member states to "take such measures as may be necessary" and to apply "effective, proportionate, and dissuasive" sanctions in order to most effectively and uniformly implement its provisions. The two-phase system of the OECD Convention provides direct oversight and management of the "necessary measures" implemented by each Member State. Phase 1 is a review of the legislation implementing the Convention that evaluates the adequacy of such laws. Phase 2 assesses the effectiveness of the application of the legislation. Thus, this system allows for tight control and follow-through by the OECD.

Specifically, OECD sanctions for bribery of a foreign public official are comparable to those applicable for bribery of a national public official within the Member State. In the

43 OECD Directorate for Financial and Enterprise Affairs, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, OECD, p. 7, available at <www.oecd.org/daf/anti-bribery/anti-briberyconvention/39801089.pdf>, access on 15 December 2015.

44 *See* OECD Convention on Combating Bribery of Foreign Public Officials (OECD Convention), 21 November 1997, Art. 1, para. 1, available at: <www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>, access on 15 December 2015.

45 *See* OCED Convention, Art. 1, para. 2.

case of natural persons, sanctions include the "deprivation of liberty sufficient to enable effective mutual legal assistance and extradition."[46] It is also suggested that each Member State consider imposing additional civil or administrative sanctions.[47]

Recognizing that some member states do not impose criminal liability on legal persons for the bribery of a foreign public official, the OECD Convention requires each Member State to "ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions."[48]

Similarly to the BACA sanctions, the OECD Convention sanctions also include the remittance of any proceeds gained from the bribery or property, and state that such proceeds "are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable."[49] The OECD Convention Commentary further defines "confiscation" to include the permanent deprivation of property through the order of a court or other competent authority.

Much like the FCPA, the OECD Convention includes "accounting provisions that require companies to maintain good books and records, as well as to establish and maintain appropriate internal controls."[50] A violation of the accounting provisions should result in the "effective, proportionate and dissuasive civil, administrative or criminal penalties."[51] These alternative forms of sanctions may include the following:

I. Exclusion from entitlement to public benefits or aid;
II. Temporary or permanent disqualification from public procurement or the practice of other commercial activities;
III. Placing the legal person under judicial supervision; or
IV. A judicial winding-up order.

20.3.3.1.2 Enforcement

Although Phase 2 of the Convention evaluates the effectiveness of each Member State's implementing legislation, the main concern of the OECD Convention with respect to this issue is to allow member states to retain control over enforcement. The only stipulation made directly in the text of the Convention is that the execution of investigations and prosecution "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[52]

46 *See* OECD Convention, Art. 3, para. 1.
47 *See* OECD Convention, Art. 3, para. 4.
48 *See* OECD Convention, Art. 3, para. 2.
49 *See* OECD Convention, Art. 3, para. 3.
50 Darrough 2010, p. 256. *See also* OECD Convention, Art. 8.
51 *See* OECD Convention, Art. 8.
52 *Id.*, Art. 5.

The Secretary-General of the OECD is designated as the middleman when dealing with issues of consultation, mutual assistance and/or extradition between member states. Accordingly, each state is required to inform the Secretary-General of their respective domestic authorities responsible for making and receiving requests.

20.3.4 Brazilian Law n. 12.846/13 (Brazilian Anti-Corruption Act)

The Brazilian Anti-corruption Act (BACA) – also frequently referred to as the Clean Company Act, since it focuses mostly on corporate liability – uses strong language to command recognition of the Act's widespread reach. However, it leaves a few key terms, such as "public agent" and "national public administration," notably undefined. Although dissatisfying, this may enable the CGU or other enforcement agencies to use this to their advantage to broaden the BACA's reach, as noted in one critic's view on the broad definition of "foreign public administration."[53] Such a broad and nebulous definition may encompass not only foreign government-controlled entities, but also public international organizations such as multilateral development banks or agencies.

20.3.4.1 Administrative Penalties

The administrative penalties established under the BACA are quite impressive, and vary, depending on the peculiarities of the case and the severity of the offence. Several factors are taken into consideration when applying sanctions:

a) The seriousness of the offence;
b) The advantage obtained or intended by the offender;
c) The consummation, or not, of the offence;
d) The degree of injury, or danger of injury;
e) The negative effect produced by the offence;
f) The offender's economic situation;
g) The legal person's cooperation with the investigation of the offence;
h) The existence of internal integrity mechanisms and procedures, auditing and encouraging of whistle-blowing and the effective enforcement of the codes of ethics and conduct within the legal entity (which were detailed later in Decree n. 8.420); and
i) The value of contracts maintained by the legal person with the harmed government department or entity.

It is unclear whether these factors would be considered mitigating factors or whether they would increase the amount or value of the sanctions being applied. There is, however, a

53 M.S.B. Correia, 'A lei anticorrupção brasileira', 20 August 2013, available at: <www.migalhas.com.br/dePeso/16,MI184617,51045-A+lei+anticorrupcao+brasileira>, access on 15 December 2015.

tendency to view their function as both aggravating and mitigating considerations in these types of cases, for the purpose of determining the appropriate fines or other punishment.

At the administrative level, the monetary fines range from 0.1%-20% of the gross revenue from the year prior to the start of the administrative proceeding. If the gross revenue cannot be approximated, fines will range from R$6,000-R$60 million. However, the monetary fines shall never be less than the amount of the advantage obtained, and are independent of any need to fully compensate for damages resulting from the act.[54] In addition to monetary fines, the BACA requires *publicação extraordinária da decisão condenatória*, which shall be done at the expense of the legal person, in a large circulation media within the practice area of the offence and where the legal person does business.[55] In situations where such publication cannot be made where the legal person does business, it must then be done in the national media and at the legal person's establishment or place of business, for a minimum of thirty days, in plain view of the public and must also be published on its website.[56]

However, BACA also contains provisions regarding lawsuits for prosecuting corruption practices. As a result of a lawsuit, a court may impose broader and more varied sanctions than it is possible to impose at the administrative level.

20.3.4.1.1 Administrative Proceedings to Investigate Liability

Once a complaint has been filed accusing a legal person of violating the BACA, a "Processo Administrativo de Responsabilização" (PAR), or an Administrative Liability Proceeding, commences. The highest authority of each department or entity within the three spheres of government can commence and judge the PAR, either ex officio or upon request.[57] This may present a conflict of interest, by having the same authority commencing the PAR as well as judging it. However, Article 8 allows for the highest authority to delegate this responsibility, and also disallows any further or subsequent subdelegation. Thus, if utilized appropriately, this delegation power could avoid such potential conflicts of interest.

Delegation is also permitted in the investigative portion of the PAR. The authority that commenced the proceeding will create a committee to lead the PAR investigation of the legal person, which must consist of at least two public servants.[58] This delegation could thus also prevent conflicts of interest, or, alternatively, it could perpetuate them, given that there are no other requirements for this committee, nor are any other so-called 'checks or balances' provided in the legislation.

54 *See* Law n. 12.846, Art. 6, Section I.
55 *See* Law n. 12.846, Art. 6, Section II.
56 *See* Law n. 12.846, Art. 6, para. 5.
57 *See* Law n. 12.846, Art. 8.
58 *See* Law n. 12.846, Art. 10.

The CGU is vested with concurrent or subsidiary competence to commence PARs, or to assume an already commenced proceeding in order to examine the validity of the proceeding's cause.[59] Article 8, paragraph 2, seems to try to centralize the power of enforcement, or at least to create some semblance of a system of checks and balances. However, without proper communication between agencies and entities, the CGU's concurrent authority could result in both the CGU and the highest authority of a department commencing a PAR against the same legal person.

20.3.4.2 Judicial Penalties

The existence of administrative liability as set forth above does not preclude the possibility of concurrent judicial liability. Violating Article 5 of the BACA allows the Union, the Federal District and the Municipalities, through their government attorneys or judicial organs, and the Public Ministry, to bring an action seeking penalties. These penalties can be assessed cumulatively or individually.

Judicial penalties include the following:

1. Forfeiture of assets, rights or securities that represent the advantage or profit obtained, either directly or indirectly;
2. Suspension or partial ban on the legal person's activities;
3. Compulsory dissolution of the legal person, but if (i) the legal person was habitually used to facilitate or promote the commission of the harmful act; or (ii) the legal person has hidden or disguised the illicit interests or the identity of those who benefited from the acts committed;
4. Prohibition of receiving incentives, subsidies, grants, donations or loans from public entities and public financial institutions *or* from those controlled by public power. This prohibition can last one to five years.

In addition, the Public Ministry, public attorneys or judicial organs (or the equivalent) can also require the freezing of assets, rights or securities to guarantee the payment of the fine or the full compensation of damages provided for in Article 7.[60]

If the Public Ministry files suit, then penalties can be applied independently to those discussed here. For this to happen, the Public Ministry must have ascertained that the competent authorities "constatada a omissão das autoridades competentes para promover a responsabilização administrativa."[61]

59 *See* Law n. 12.846, Art. 8, para. 2.
60 *See* Law n. 12.846, Art. 19.
61 *See* Law n. 12.846, Art. 20.

20.3.4.3 Enforcement and Follow-Through

With this broad reach in mind, the BACA indicates three main agencies as being able to enforce sanctions: the *Tribunal de Contas da União* (TCU), the *Controladoria-Geral da União* (CGU) and the Public Ministry. The CGU also has specific jurisdiction over enforcing violations for bribery of non-Brazilian public officials, and is subject to Article 4 of the OECD Convention.[62] Yet there is no official system of communication between these agencies to facilitate the enforcement of these penalties.

The *Cadastro Nacional das Empresas Punidas* (CNEP), or the National Registry of Punished Companies, must gather and publicize the penalties applied by the agencies or entities within the three spheres of government, with the help of the agencies and entities themselves, who are supposed to inform and keep the CNEP updated. Those authorized to enter into leniency agreements are also supposed to provide such information to the CNEP, unless doing so would be harmful to the administrative proceeding. Information in the CNEP includes: the name and registration number of the legal person, the kind of penalty applied as well as the length of the penalty.[63]

20.3.4.4 Leniency Agreements

On the topic of leniency agreements, the BACA possibly contradicts itself. Article 16 authorizes the highest authority within each public body or entity to enter into leniency agreements. However, Article 10 names the CGU as the competent body to enter into leniency agreements within the federal government with respect to corrupt practices against federal governments.[64] Nowhere in the law itself or in Decree n. 8.420 is a formal system for tracking or communicating the creation of these leniency agreements mentioned.

In order to qualify for a leniency agreement, the legal person must:

(1) be the **first** to express intent to fully and permanently cooperate in the BACA investigation and proceeding (this requirement was eased by MP 703; the first one in is simply given the benefit of more extensive immunity);
(2) identify the parties involved in the violation of the BACA;
(3) confess to its participation in the wrongdoing;
(4) completely ceases its own involvement in the violation from the date of the agreement; and
(5) provide information and documents proving the violation.[65]

62 *See* Law n. 12.846, Art. 9.

63 *See* Law n. 12.846, Art. 22.

64 *See* Law n. 12.846, Art. 16, Section III, "The Comptroller-General of the Union-CGU is the competent body to authorize leniency agreements under Federal Executive branch as well as in cases of harmful acts committed against a foreign government."

65 *See* Law 12.846, Article 16, Items I-III and Paragraph 1.

If a legal person qualifies for a leniency agreement, it can escape sanctions and the applicable fine is reduced. Article 17 authorizes leniency agreements to be used to exempt or reduce the administrative sanctions for violations of Law 8.666, the law dealing with biddings and contracts. This is a tremendous incentive for companies to self-report, especially considering the penalties associated with disbarment and disqualification. The benefits were extended by MP 703, and the participation of other control bodies increases the legal certainty, finality and therefore the attractiveness of the BACA leniency agreements.

20.3.5 Brazilian Decree n. 8.420 (Secondary Legislation to Law n. 12.846)

Decree n. 8.420 of 18 March 2015 is the instrument that regulates the BACA. It specifically regulates the strict administrative liability of legal persons in their acts against the government, national or foreign, as provided for in the BACA.

20.3.5.1 Administrative Liability Proceedings Clarified

As mentioned in the previous section, the highest authority within the agency or entity may commence and judge the administrative liability proceeding. However, Decree n. 8.420 specifies that this shall be the highest authority of the entity against which the violation was performed. If the acts were committed against a government department the competent Minister shall commence and judge the proceedings. The highest authority or Minister will be able to decide whether (i) to open a preliminary investigation; (ii) to commence the PAR or (iii) to terminate the PAR.

The Decree further clarifies that the preliminary investigation will be non-punitive and is meant only to gather information regarding the accused and details about the harmful acts. The investigation is also limited to a viability period of just sixty days, although this may be extended for another sixty days upon a justified request.

The preliminary investigation and its report are quite important. The information collected during the investigation is then sent to another committee, appointed by the authority that commenced the PAR, to evaluate the evidence and submit a report to the competent authority.[66] The report will suggest the penalties to be imposed, fine calculation or termination of the PAR.[67] This committee must then notify the legal person to allow it to gather evidence and submit a defence within thirty days.

It is in the Decree that we find, for the first time, mention of independence and impartiality. Here, it refers to the investigation committee.[68]

66 *See* Decree n. 8.420, Art. 4.
67 *See* Decree n. 8.420, Art. 9, para. 3.
68 *See* Decree n. 8.420, Art. 6.

The Decree also limits the PAR to a conclusion date within 180 days, although an extension of this deadline may be permitted.[69]

20.3.5.2 The CGU

The role of the CGU becomes much clearer in Article 13 of Decree n. 8.420. It provides that the CGU can exercise its competence provided any of the following occurs:

1. An omission of the originally competent authority;
2. The non-existence of objective conditions for the competent performance in the original department or entity;
3. The complexity, repercussion and matter relevance;
4. The value of contracts maintained by the legal person with the injured department or entity; or
5. An investigation that involves acts and facts related to more than one governmental department.

All governmental departments and entities are required to report all documents and information, including PARs, to the CGU. In addition, Article 14 notes that CGU is in charge of prosecuting corrupt practices against foreign governments regarding administrative liability.[70]

A stronger effort is being made to centralize the information within the CGU. However, without a formal reporting system in place, the likelihood of success is slim. In addition, TCU has exercised its supervisory role by enacting regulations that provide for oversight of leniency agreements, thus submitting CGU to a real-time review of its actions in this field.

20.3.6 Brazil's Laws on Disqualification and Debarment

Total or partial non-performance of agreements signed with the government, as well as fraud in the bidding, may both be penalized in four distinct ways, all of which will prevent the participation of such persons in future biddings. In general, these legal concepts are administrative sanctions against extremely serious offences.

In Brazil, the effects and reach of each sanction vary in accordance with the text of their respective implementing legal provisions. In short, Law n. 8.666 establishes (i) the suspension of the right to participate in biddings and (ii) the declaration of disreputability

69 *See* Decree n. 8.420, Art. 9.

70 *See* Decree n. 8.420, Art. 14, "The Comptroller-General of the Union shall commence, investigate and judge the Administrative Liability Proceeding for the performance of harmful acts to foreign government, which shall observe the procedure provided for in this Chapter, if possible."

(debarment); Laws n. 10.520 and n. 12.462 establish (iii) the disqualification to bid; and Law n. 8.433 establishes (iv) a specific concept of declaration of debarment imposed by TCU.

The current approach to suspension, disqualification and debarment in Brazil is strictly punitive. However, notions such as self-cleaning and rehabilitation based on the lack of risk of future contracts and on protective measures are in their early stages of development.[71]

20.3.6.1 General Public Procurement Law (Law n. 8.666)

In accordance with the law that governs the general rules of biddings and administrative agreements (Law n. 8.666), the suspension of the right to participate in biddings and the declaration of disreputability (debarment) are applied in cases of contractual non-performance. They are provided, respectively, in sections III and IV of Article 87. In addition, Article 88 of Law n. 8.666 extends the sanctions of suspension and debarment to other conducts.

There is no consensus among scholars and court decisions about the scope of application of each of these penalties. These two terms are frequently used interchangeably; however such use is improper, and the concepts and their consequences are quite distinct.

Of course, there is undoubtedly some similarity between suspension and debarment, in that both sanctions ultimately prevent the entity responsible for the violation from participating in biddings and contracting in general with the Public Administration (Government). However, although these sanctions are not expressly defined by the law, some key differences between them have nonetheless been authoritatively established.

First of all, a linguistic distinction is noted between items III and IV of Article 87. Item III establishes that the suspension of the right to bid applies to contracts involving the "Administration," while section IV establishes that the statement of disreputability (debarment) refers to the "Public Administration." These terms are defined in Article 6 of Law n. 8.666 as meaning respectively only the specific procuring agency (Administration) or all levels (federal, state and local) and types (direct and indirect administration) of government departments and agencies (Public Administration).

Some authors believe that this language distinction creates a distinction in the respective impacts of each sanction. The suspension of the right to participate on a bidding affects only the entity or department that imposed it, since the law reads "Administration" instead of 'Public Administration.' Therefore, during the period proscribed by the sanction, a sanctioned company will not be able to participate in future biddings or agreements with the department or agency that imposed the sanction.

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71 *See* C.A.G. Pereira & R.W. Schwind, 'Autossaneamento, (Self-Cleaning) e Reabilitação no Direito Brasileiro Anticorrupção', 26 August 2015, available at: <http://www.migalhas.com.br/dePeso/16, MI225754,71043-Autossaneamento+selfcleaning+e+reabilitacao+de+empresas+no+direito>, access on 15 December 2015.

Regarding disreputability (debarment), the authors who defend the interpretation explained above believe that its effects reach the whole Public Administration, and thereby prohibit participation by the offending party in biddings and contracting in general, with all departments, agencies and entities of the Federal Government, States, Federal District and Municipalities.

Marçal Justen Filho, on the other hand, proposes a second line of thought, which argues that the distinction in the text between the terms 'Public Administration' and 'Administration' is not decisive.[72] Although there are variations, STJ case law tends to support the interpretation that both suspension and debarment may extend to all government levels, not only the procuring agency that imposed the sanction.

There is also some disagreement regarding the intended nature of these two measures. Marçal Justen Filho argues that a suspension is meant to compel a bidder or contractor to cure its wrongdoing, while debarment is merely intended as a mechanism for punishment.[73] In an article regarding the European notion of 'self-cleaning,'[74] Cesar Pereira and Rafael Schwind assert that debarment is in fact a protective measure, and is not exclusively an instrument for punishment of violations. According to the plain language of the statute, this measure should be applied as a last resort, and only if the reasons necessitating its application have not yet been cured by the offending entity. Therefore, if the punished company has adopted enough initiatives to prevent new wrongdoings, it should not be punished, or, in other words, it should be considered rehabilitated.

With regard to the gravity of the two penalties, the declaration of disreputability has more serious consequences for the punished company. This sanction indefinitely prevents contracting with the government, and can only be imposed by high-level officials, such as Ministers or State, District or Municipal Secretaries (Art. 87, §3). The temporary suspension, on the other hand, is far less severe, as it has a maximum duration of only two years and may be imposed by the procuring agency itself (Art. 87, item III).

Comparing the legal nature of these legal concepts with the provisions of the U.S. Federal Acquisition Regulation[75] (FAR), it appears that the temporary suspension and the declaration of disreputability, as provided by Brazilian law, do not have a preventive nature. FAR 9.4, in turn, besides evaluating misconduct, also analyses the possibility of repairing the damage and other mitigating factors, such as the implementation of programmes to prevent infractions (*i.e.,* the existence or use of preventive measures).[76]

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72 M. Justen Filho, *Comentários à Lei de Licitações e Contratos Administrativos*, 15th edn., Revista dos Tribunais, São Paulo 2012, p. 1020.

73 *Id*., p. 1021.

74 Pereira & Schwind 2015.

75 48 C.F.R. §1 *et seq* (2001).

76 A comparative discussion can be found in Pereira & Schwind 2015. *See also:* <www.fcpablog.com/blog/2012/6/25/suspension-debarment-part-iii-mechanics-and-mitigating-facto.html>, access on 15 December 2015.

20.3.6.2 Law n. 10.520

Brazilian Law n. 10.520 regulates reverse auctions, which is a bidding method intended to allow for the purchase of common goods or services.

Article 7 of the law has its own list of infractions that are specific to reverse auctions and that are punished by disqualification to bid.

The disqualification to bid is a different legal concept from the suspension of the right to participate in biddings and declaration of disreputability, as explained above. The bidder that commits an Article 7 offence will be barred from participating in tenders with the government for up to five years. The law further provides that the bidder will be barred from bidding and contracting with the Federal Union, States, Federal District or Municipalities. The conjunction "or" demonstrates *an option*, showing that the disqualification from bidding may beonly from the level of government at which the wrongdoing was committed.

This legal scenario does not prevent the bidder from also incurring penalties for violations under Law n. 8.666. If the bidder of the reverse auction practises any of the offences referred to in Article 7, the penalty applied will be the prohibition to bid, as provided for in Law n. 10.520. However, due care must be taken to avoid the simultaneous application of sanctions under both laws, as this may amount to double jeopardy. One should also remember that secondary legislation (codified in Decrees n. 3.555 and 5.450) gives more detail to these rules.

Furthermore, the combination of sanctions would lead to an unlawful result. If a certain conduct is punishable by the sanctions of both Law n. 8.666 and Law n. 10.520, then the application of both penalties would result in an outcome that is not desired by either statute. None of the laws intended for a bidder to be debarred for seven years (five under Law n. 10.520 and two under Law n. 8.666). A simultaneous application of the penalties will require that their respective debarment times run concurrently, so that a bidder in this situation will be for the first two years suspended for purposes of both statutes, and for the remaining three years debarred only for the purposes of Law n. 10.520.

Finally, the violations that may result in the disqualification to contract with the government are not limited to the situations provided in Articles 87 and 88 of Law n. 8.666. Article 7 of Law n. 10.520 sets forth other actions that can result in the disqualification, including: failure to conclude the contract, failure to deliver, presentation of false documentation required for the bidding, giving rise to delay in the execution of the contract scope, failure to honour its proposal, failure or fraud in the performance of the agreement, disreputable behaviour and committing tax fraud.

20.3.6.3 Law n. 12.462

Article 47 of Brazilian Law n. 12.462 (Differential Public Procurement Regime, "RDC" in the Brazilian acronym) essentially copies Article 7 of Law n. 10.520. It provides for disqual-

ification to bid and contract with the Federal Union, States, Federal District or Municipality for up to five years. Thus, similarly to the reverse auctions, the disqualification to bid may clearly be restricted to the governmental entity that applied the sanction.

In this case, the impediment to bid is also distinct from the sanctions provided in Law n. 8.666. It is not like the declaration of disreputability, as it does not have an indefinite period and does not necessarily reach the entire government. It is also distinct from the suspension of the right to participate in biddings, in that it imposes a longer maximum duration (five years).

Moreover, it should be noted that the impediment to bid covers any public bidding held by the federal entity that applied it. Thus, this sanction cannot fulfil its function if it is applied only to biddings governed by the RDC.

Finally, as with the Reverse Auction Act, Law n. 8.666 can be applied in a subsidiary way to the RDC, provided that it does not lead to double jeopardy.

20.3.6.4 Law n. 8.443

TCU can also debar a bidder for a maximum period of five years. Article 46 of TCU Law (Brazilian Law n. 8.443) provides that

> [O]nce verified the occurrence of fraud in the bidding, the Court will declare the debarment of the unlawful bidder to participate for up to five years in biddings of the federal government.

However, the declaration of disreputability (debarment) provided by the TCU Law is different from the one provided by Law n. 8.666. While the declaration provided in Law n. 8.666 is applied by the government itself for an indefinite period, TCU's debarment has a maximum duration of five years.

A second distinction lies in the way in which each law's respective penalties are applied. Under Law n. 8.666, the declaration of disreputability occurs in cases of total or partial non-performance of the agreement and other conducts described in Article 88. Under Law n. 8.443, the declaration is applicable only to the company engaging in fraud in the bidding procedure.

Finally, another distinction between the penalties of Laws n. 8.666 and n. 8.443 is the possibility of rehabilitation. On this point, TCU has ruled that according to Law n. 8.666, the bidder who is declared disreputable may, upon the expiration of a two-year period, achieve rehabilitation through reimbursement of the harm caused by its wrongdoing. In

turn, the declaration of disreputability imposed by TCU can only be revised by the administrative appeals available under TCU procedural rules.[77]

20.4 A Brief Comparison between the Brazilian Anti-Corruption Laws and the Foreign Corrupt Practices Act

Unlike the BACA, which is a strict liability statute at least to some extent,[78] the FCPA requires proof of corrupt intent.[79] Distinct from both the FCPA and the UK Bribery Act, the BACA holds parent and affiliate companies along with subsidiaries and members of the same consortium in a given public contract jointly liable. In the case of a sale or merger, the successor is only liable for a fine up to the value of the transferred assets.[80]

The accounting requirement of the FCPA is applicable to any company that is required to report to the SEC, regardless of its involvement in foreign business.[81]

The penalties under the FCPA can range up to US$2 million, or twice the amount of the pecuniary gain sought in the bribe violation.[82] Under the BACA, however, they range from R$6 thousand-R$60 million (about US$25 million). Leniency agreements can be made under both the FCPA and the BACA regimes. The cooperation in relevant investigations and administrative proceedings will result in a mitigated fine (reduced by up to two-thirds the amount) under the BACA.

The enforcement models of the FCPA and BACA differ greatly. The FCPA enforcement authorities are the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Because of their long history together, they have a uniform and consistent system of enforcement. The BACA, however, allows any entity within the three branches of government that is impacted by the unlawful conduct to bring an action to enforce the law.[83] Without a system of coordination, both of these will likely lead to inconsistent rulings and conflicts of interest. It should be noted that MP 703 attempted to enhance institutional coordination at least with regard to leniency agreements.

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77 Ruling n. 1287/2007-TCU-Plenário, Minister Aroldo Cedraz, judged on 27 June 2007, available on Official Gazette dated 29 June 2007 at: <https://contas.tcu.gov.br/juris/Web/Juris/ConsultarTextual2/Jurisprudencia.faces?anoDocumento=&numeroDocumento=&colegiado=PLENARIO&ano=&situacao=&cpf=&anoProcesso=&relator=&textoPesquisa=&numero=&numeroAto=&tipo=&numeroAcordao=1287&numeroProcesso=&anoAcordao=2007>, access on 15 December 2015.

78 As M. Justen Filho has pointed out in lectures not yet turned into published material by the time of closing of this book, strict liability under the BACA may apply only in the agency relationship (liability of the company for its agents' wrongful conduct). However, the acknowledgment of a corrupt practice will always require proof of intent under the BACA.

79 Correia 2013.

80 *Id.*

81 Darrough 2010, p. 256.

82 Correia 2013.

83 *Id.*

20.5 A Brief Comparison between the Brazilian Anti-Corruption Laws and the UK Bribery Act

Similarly to the jurisdictional reach of the Brazilian Constitution, the UK Bribery Act is applicable to "foreign companies that have a business presence in the U.K. A foreign company that carries on any part of its business in the U.K. could be prosecuted for the failure to prevent bribery, even when the bribery takes place wholly outside the U.K."[84]

Unlike the Brazilian anti-corruption laws, the U.K. Bribery Act holds companies liable for subcontractors and third parties by way of their joint ventures.[85]

The Bribery Act does not require an "element of 'corrupt' or 'improper' intent in relation to the bribery of a foreign public official" like the FCPA, but does for a general bribery offence.[86]

Also unique is Brazil's ability to make leniency agreements with individual actors. The U.K. Bribery Act only allows companies to settle with a "deferred prosecution agreement," which entitles the company to settle certain allegations by agreeing to the conditions set by the prosecutor, such as financial penalties or cooperation with other prosecutions, but without requiring an admission of guilt.[87] In the Brazilian system, leniency agreements are authorized for companies accused of violating the BACA who self-report and cooperate with relevant investigations and administrative proceedings. Doing so will result in a two-thirds reduction of the applicable fines.[88]

Similarly to the BACA, the Bribery Act allows for mitigation of financial penalties if the company in question has adequate procedures in place to prevent bribery.[89] Compliance has been a difficult issue for U.S. companies to implement because of the intense requirements needed to muster under the FAR, which holds contractors liable for corruption within their subcontractors and supply chain.

84 Egan 2014.
85 *Id.*
86 Correia 2013.
87 Egan 2014.
88 Correia 2013.
89 *Id.*

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brazil infrastructure law

This book offers the international reader a comprehensive view of Brazilian infrastructure law from the standpoint of key local practitioners. It is divided into two sections. The first part features a collection of essays on the most significant infrastructure topics. It is followed by bilingual versions of the main statutes and regulations examined in the various essays found in Part 1. A glossary of essential infrastructure terminology is also included.

The topics discussed in this book range from an overview of the Brazilian constitutional structure to in-depth analyses of regulated sectors, public procurement, and dispute resolution. The various essays contained herein cover the fundamental legal issues an international player must keep in mind when working in the Brazilian infrastructure market. This work utilizes a comparative approach, and is intended to correlate Brazilian legal specificities with their counterparts in internationally recognized models.

This work aims to provide essential guidelines that will enable international infrastructure investors, practitioners, and scholars to successfully navigate Brazilian law and legal practice.

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